No. 09-1418

IN THE

Supreme Court of the United States

TALISMAN ENERGY, INC.,
Petitioner,
vs.
THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A, FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KUEIGWONG RAT, LUKA AYUOL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Respondents respectfully submit this Supplemental Brief pursuant to Rule 15.8 in response to the *amicus curiae* briefs of Professors James Crawford and Malcolm N. Shaw in support of Talisman Energy, Inc.'s ("Talisman") Conditional Cross-Petition.[1]

INTRODUCTION

The Alien Tort Statute ("ATS") is a civil tort statute providing common law remedies for violations of the law of nations. There is no dispute in this case that plaintiffs have alleged violations of the law of nations (genocide, war crimes and crimes against humanity) actionable under *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). The issue in this case is whether, under principles of federal common law or customary international law, Talisman may be found liable in tort for its complicity in these indisputable human rights violations.

The amicus briefs submitted by Professors Crawford and Shaw offer no reason for this Court to grant Talisman's Conditional Cross-Petition. These *Amicus* briefs do not alter the fact that *no* decision supports Talisman's claims that corporations are exempt from liability under the ATS or that the ATS is limited to acts occurring within the territory of the United States. No principle of international law, in

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[1] These briefs were filed and received by Respondents' counsel after the deadline for the submission of Respondents' Opposition to the Conditional Cross-Petition.

1789 or now, prevents U.S. courts from adjudicating ATS cases such as these against private entities, including corporations subject to personal jurisdiction in the United States.

Neither Professor Crawford nor Professor Shaw is an expert on U.S. law or this Court's *Sosa* decision. Professor Crawford has been Talisman's expert in this case since 2002. The district court rejected essentially the same arguments when they were submitted in affidavit form, dismissing them as "anachronistic." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 315 (S.D.N.Y. 2003).

Professor Crawford bases his brief on Talisman's flawed interpretation of footnote 20 in *Sosa*. 542 U.S. at 733. Thus, his opinion that an ATS plaintiff must show that a particular ATS defendant owes a duty to the ATS plaintiff under general international law in order to state a viable ATS claim is not based on *Sosa* or any other ATS decision. Crawford Br. 3. The language of the ATS contains no exemption for corporations or any other defendant. The Founders were well aware of corporations by 1789 and knew how to exclude them from a statute if that was the intention. *Cf. Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 925-26 (2010) (Scalia, J., concurring).

Similarly, Professor Shaw's brief ignores established U.S. jurisprudence, dating back to the founding of our nation, allowing U.S. courts to adjudicate transitory torts, on which the Second

Circuit's seminal decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980), was based. Both briefs ignore the language, history and purpose of the ATS, this Court's *Sosa* decision and the entire body of ATS jurisprudence.

I. PROFESSOR CRAWFORD'S OPINIONS REFLECT A FUNDAMENTAL MISUNDERSTANDING OF THE ATS AND *SOSA*.

Professor Crawford's opinions are based on a fundamental misunderstanding of U.S. law, including the ATS, and of this Court's opinion in *Sosa*. As Judge Edwards emphasized in *Tel Oren v. Libyan Arab Republic*, 726 F. 2d 744, 791 (D.C. Cir. 1984) (Edwards, J., concurring), and as this Court confirmed in *Sosa*, 542 U.S. at 724, to read the ATS as requiring that the elements of the federal common law cause of action be found in international law would render the ATS a dead letter because international law does not characteristically specify the domestic means for its enforcement. Such a reading would clash with the fundamental principle of statutory construction that a statute should not be construed "so as to render any part of it 'inoperative or superfluous, void or insignificant'" *Tel Oren*, 726 F.2d at 778 (finding that international law does not define the means of its enforcement) (Edwards, J., concurring).

Professor Crawford states that "even if corporate liability were recognized under customary international law, it is not 'accepted by the civilized

world and defined with specificity comparable to the features of the 18th century paradigms," as required by *Sosa*." Crawford Br. 15. However, there is nothing in *Sosa* that states, much less holds, that the historical paradigm test applies to any issue beyond the threshold "law of nations" violation conferring jurisdiction upon the courts to provide a federal common law remedy for such violations.

His views concerning State responsibility under international law are not relevant to the question of whether private actors, such as Talisman, may be subject to liability in federal courts under the ATS. This Court's inclusion of corporations in the category of private actors potentially subject to liability under the ATS implicitly rejects Professor Crawford's attempt to undermine existing ATS jurisprudence. *Sosa*, 542 U.S. at 733 n.20.

In *Sosa*, this Court recognized that the law of nations includes "hybrid" norms that regulate the conduct of private actors and contemplate the private enforcement of such norms. *Sosa*, 542 U.S. at 715. This Court's historic paradigm test recognized that certain modern customary international law norms fall within the "hybrid" category of norms contemplated by the Founders and are actionable under the ATS.[2]

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[2] "There was finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the

In his analysis of international corporate liability, Crawford relies almost exclusively on international criminal law. The ATS, however, is a civil tort statute. Professor Crawford refers to "[s]ubstantive criminal law treaties and treaties establishing international courts and tribunals." Crawford Br. 4. But the international instruments Crawford refers to are products of political compromises to establish particular institutions and were not meant to embody customary international law, or to create any corporate immunities from criminal or civil liability in domestic courts.[3] These treaties explicitly do not purport to supplant customary international law. Scheffer Br. 7.[4]

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criminal law of England: violation of safe conducts, infringement of rights of ambassadors, and piracy . . . . It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to a tort." *Sosa*, 542 U.S. at 715.

[3] As Professor David Scheffer explains, the Rome Statute reflects years of compromise among states. In particular, Article 25(3)(e) addressing secondary liability retains an ambiguity that only the ICC itself can resolve in a future case. Brief of David J. Scheffer as *Amicus Curiae* in support of the issuance of a writ of certiorari, at 25, *Presbyterian Church of Sudan v. Talisman*, No. 09-1262 (May 19, 2010) ("Scheffer Br.")

[4] There are numerous modern treaties that explicitly provide for the liability of non-natural persons,

The implication of Professor Crawford's opinions is that it would violate international law for a State to impose civil or criminal liability on corporations that aid and abet widespread and systematic human rights violations. But the absence of an international corporate regulatory regime does not mean that domestic legal regimes are incapable of enforcing the law of nations against private actors, as the Founders provided for in the ATS.

It is up to each State to decide if it will impose criminal or civil sanctions on private actors, such as corporations, that violate customary international law norms. Moreover, some States have applied international rules prohibiting genocide, slavery and torture against individuals, such as companies and government officials in their domestic systems and impose criminal liability on violators.[5] For example,

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such as corporations. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; Convention on Combating Bribery of Foreign Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1. Thus, any argument that international law generally does not apply to corporations has been superseded by numerous actions taken by the international community.

[5] *See* International Commission of Jurists, 2 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes (2008) ("ICJ Report"), http://icj.org/IMG/Volume_2.pdf. The ICJ Report notes that while international fora only have jurisdiction to prosecute corporate officials, not corporate entities,

in Australia, the extraterritorial offenses of genocide, crimes against humanity, and war crimes were enacted in the Commonwealth Criminal Code to give effect to the crimes within the ICC's jurisdiction under Australian law. The code explicitly imposes criminal liability upon corporations for gross human rights abuses committed abroad and confers universal jurisdiction over such crimes.[6] Under Professor Crawford's analysis, such legislation would violate international law but this is plainly not the case.

Even if international law was relevant to the issue of corporate liability, an examination of international consensus on corporate civil liability cannot focus solely on the treatment of corporations in international criminal treaties. Professor Crawford ignores the fact that corporate civil liability

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national legal systems have the power to prosecute corporate entities for breaches of international law. The report also indicates that corporations may be sued in tort in domestic legal systems for such violations.

[6] Criminal Code Act, 1995, § 268 (Austl.), *amended by* Criminal Court Act, 2002 (Austl.); *see also* Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. Int'l Crim. Just. 809 (2007). Corporations are also capable of prosecution for core international crimes under Canadian Criminal law. *See* Canadian Criminal Code, R.S.C., ch. C-46, § 2 (1985) (defining "everyone" and "person" to include corporate entities).

is a general principle of law found in all legal systems."[7]

For example, the International Commission of Jurists Expert Panel on Corporate Accountability and Legal Complicity, cited by Crawford. (Crawford Br. 12-14), found that civil liability for corporations who perpetuate or aid violations of customary international law norms is widely accepted and recognized.[8]

In sum, the Crawford brief offers no evidence for any international exemption or immunity for corporations when they aid and abet violations of paradigmatic norms "admitting a judicial remedy and at the same time threatening serious consequences in international affairs." *Sosa*, 542 U.S. at 715. No such evidence exists.

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[7] *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 reporters' note 1 (1987) (discussing general principles as a source of international law).

[8] *See* ICJ Report, *supra*, Volume 3, http://icj.org/IMG/Volume3.pdf. *See also* Brief of *Amici Curiae* International Law Scholars in Support of Plaintiffs-Appellees, *Balintulo v. Daimler* at 15-19, No. 09-2778-CV (Dec. 22, 2009) (reviewing a survey of corporate liability regimes in twenty-two countries, representing both common law and civil law tradition, wide geographic distribution, and varying levels of economic development, confirmed "no jurisdiction that lackedl the legal means of holding juridical persons accountable for their actions.")

II. THE EXTRATERRITORIAL APPLICATION OF THE ATS VIOLATES NO NORM OF INTERNATIONAL LAW.

A. The ATS Provides a Forum for the Adjudication of Transitory Torts Based on the Law of Nations.

Professor Shaw ignores common law jurisprudence that dates back to the founding of this country allowing courts to adjudicate transitory torts regardless of the nationality of the parties or where the tort arose.[9]

Sosa confirmed that at the time the ATS was passed, the law of nations was understood to be part of federal common law. *Sosa*, 542 U.S. at 720-25. Thus, there is little doubt that the Founders understood that the ATS provided a remedy for transitory torts in violations of the law of nations.

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[9] *See McKenna v. Fisk*, 42 U.S. 241, 248 (1843) ("Crimes are, in their nature local . . . . But personal injuries are of a transitory nature, and *sequuntur forum rei*") (citing Chief Justice De Grey); *Dennick v. Central R. Co. of N.J.*, 103 U.S. 11 (1880) ("It is no objection that all the parties to the suit are aliens or non-residents, and that the cause of action arose abroad.") (internal citations omitted); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811) (assault and battery claims are transitory); *see also Printz v. U.S.*, 521 U.S. 898, 907 (1997) (noting in relation to transitory actions that U.S. courts "applied the law of other sovereigns all the time" and citing to *McKenna v. Fisk*).

See Filartiga v. Pena-Irala, 630 F.2d 876, 885-86 (2d Cir. 1980) (situating the ATS within the history of transitory torts); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992) (citing *Filartiga* to state that "the First Congress enacted the predecessor to §1350 to provide a federal forum for transitory torts (a tort action which follows the tortfeasor wherever he goes.)"). Professor Shaw's opinions completely ignore this history and precedent.

B. The Adjudication of Transitory Torts Based on Violations of the Law of Nations Has Never Been Prohibited by International Law.

Professor Shaw's view that United States courts violate international law by adjudicating transitory tort claims conflicts with established U.S. law and goes beyond the authorities he cites. International law has always permitted States to exercise jurisdiction over acts committed outside their territory as long as such jurisdiction is not prohibited by international law. *See S.S. "Lotus" (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept.7).

Since the Founding of the United States, courts have held that jurisdiction exists over transitory torts committed extraterritorially by

foreign defendants against foreign plaintiffs.[10] Foreign nations have also recognized civil claims arising from extraterritorial conduct.[11] Additionally, international courts have endorsed the domestic adjudication of extraterritorial civil claims arising from gross violations of international law.[12] There is no doubt, that the adjudication of extraterritorial transitory torts committed by foreign defendants against foreign plaintiffs is permitted by international law.[13]

Professor Shaw's concerns about the reach of the ATS have been appropriately addressed by the courts through various doctrines of discretion,

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[10] *See, e.g., Carbotrade S.P.A. v. Bureau Veritas*, 99 F.3d 86, 91-93 (2d Cir. 1997) (jurisdiction existed over a foreign plaintiff and defendant for a tort arising in Greece); *Morisette v. Canadian Pac. Ry. Co.*, 76 Vt. 267 (1904) (jurisdiction existed over a Canadian resident plaintiff and a Canadian corporation defendant over a tort claim arising in Canada); *Roberts v. Dunsmuir*, 75 Cal. 203 (1888) (jurisdiction existed over two foreign defendants for a tort arising in Canada when personal service was made within the United States).

[11] *See* Br. in Opp'n. to Talisman's Conditional Cross-Pet. 29 n.29.

[12] *See Id.* at 29.

[13] *See* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 Harv. Int'l L.J. Online 35, 38-44 (2010), http://www.harvardilj.org/articles/dodge.pdf.

including *forum non conveniens* and international comity. *See Sosa*, 542 U.S. at 733 n.21.[14] Talisman raised and lost these arguments below and did not cross-appeal any of them. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 335-49 (S.D.N.Y. 2003) (rejecting Talisman's arguments on *forum non conveniens*, international comity, act of state and political question). The Second Circuit did not consider any of these doctrines. These well-established doctrines address all of Professor Shaw's professed concerns on Talisman's behalf in a more appropriate, nuanced manner than the argument that the ATS has no extraterritorial application.

C. The ATS Is Only One of Several U.S. Laws Permitting the Adjudication of Extraterritorial Claims Involving Foreign Actors.

There are many other areas of the law where extraterritorial jurisdiction has been affirmed in cases involving completely extraterritorial claims and foreign litigants. For example, in *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 484-86 (1983), this Court held that jurisdiction could exist in a civil

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[14] *See, e.g., Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (foreign sovereign immunity); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (political question); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (*forum non conveniens*); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) (international comity and *forum non conveniens*).

suit brought under the Foreign Sovereign Immunities Act over a claim between foreign parties that arose abroad.[15]

The Racketeering Influenced and Corrupt Organizations Act ("RICO"), has also been applied extraterritorially against foreign defendants by foreign plaintiffs.[16] Professor Shaw's view would alter the U.S. legal landscape in a manner with implications far beyond the ATS.

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[15] *See also Republic of Arg. v. Weltover*, 504 U.S. 607 (1992).

[16] *See, e.g., Licea v. Curacao Drydock Co., Inc.*, 584 F. Supp. 2d 1355, 357-59 (S.D. Fla. 2008) (jurisdiction under RICO for actions involving Cuban plaintiffs and Curacao-based defendants for claims arising in Cuba and Curacao).

CONCLUSION

For all of these reasons, the views of Professors Crawford and Shaw offer no additional reasons for this Court to grant Talisman's Conditional Cross-Petition. The Conditional Cross-Petition should be denied.

Dated: July 20, 2010

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